

BOOK REVIEWS.

By G. W. P.

CONSTITUTIONAL LEGISLATION IN THE UNITED STATES.—ITS ORIGIN AND APPLICATION TO THE RELATIVE POWERS OF CONGRESS AND OF STATE LEGISLATURES. By JOHN ORDRONAUX, LL.D., Professor in the Law School of Columbia College. Philadelphia: T. & J. W. Johnson & Co., 1891.

“The government of forty-four independent States, dwelling in harmonious relations under a supervisory Federal sovereignty, would seem to justify the treatment of legislation as a department of jurisprudence meriting more textual consideration than it has yet received.” Such is the reason which, in his preface, Professor Ordronaux assigns for the preparation of this valuable addition to the literature of American Constitutional Law. The object of the work is to present in a concrete form the entire system of Federal and State legislation, and its scope includes an exposition of “those administrative powers which, in our dual form of representative government, are sovereign within their several spheres of action.”

This statement leads the reader to expect a volume of unusual interest and importance, and it may be said with confidence that all thoughtful readers of this work will find their expectations to a great extent realized, although there will be a certain admixture of disappointment. Portions of the subject are treated with marked ability, and there is in the author's stylé that dignified tone and that pleasing, partially-subdued eloquence which seems to come like an inspiration to our best writers on constitutional law. Whether it is that, as just suggested, the subject is itself inspiring, or whether it is that the paramount importance of the subject attracts the attention of men of the first rank, it is, nevertheless, a fact that the nationalist expounders of the Constitution of the United States, both on the bench and at the bar, express themselves with an impressiveness quite unknown in other departments of legal literature. By their tempered enthusiasm they stimulate

the patriotism of the reader, and by the earnestness of their arguments they carry conviction to his mind. Modern writers exhibit this characteristic as well as those who, like Hamilton and Marshall, were busied in rearing the structure which is now complete. Every reader of Judge Hare's great work on Constitutional Law will recognize the truth of this remark, and it is most gratifying to find that Professor Ordranax's book is not lacking in this respect.

The development of the author's subject may be traced by means of his chapter-titles, a list of which is, indeed, the only table of contents with which the book is provided. The first two hundred pages are occupied with an exposition of the fundamental principles and historical facts which lie at the basis of English and American constitutional law. The opening chapter is entitled, "Sources of Representative Government in the United States." It contains little that is new or original, but it is a thoughtful and well-written chapter, and does full justice to its subject. The author finds in the Revolution of 1688 the completion of "the edifice of free government," and he traces thence the inspiration of the American colonists and the initial links in that chain of events which "wrought out, as a stupendous conclusion, a union of sovereign States based upon a Constitution ratified by the entire people." The foundations of all governments are shown to rest either upon the traditions of *dogma* or upon the doctrine of *convention*, and it is the convention, or primary assembly of the people—the first expression of their organized sovereignty—which is, in our American nation, the supreme law-making body. "In such a nation," says Professor Ordranax (p. 14), "the status of political subject, or his classification in any form, is unknown because inapplicable, and the word citizen takes its place, with all the powers, privileges and immunities which the law of the land accords to such a person." All legislative power in the United States is, accordingly, said to exist in two forms, (1) as political or sovereign power, the nation as a whole embodying the political sovereignty, supreme and unlimited.

(2) As civil or delegated power, the legislature representing the legal sovereignty as bounded by constitutional limitations. Hence, political legislation belongs exclusively to the people as a nation, while civil legislation belongs to the legislature proper and, indirectly, to the judiciary in the exercise of their supervisory power. The second chapter is an interesting essay on "The Organization and Development of Representative Government in the United States." The author gives the sanction of his name to the view that the federative union of Hartford, Wethersfield and Windsor furnishes us with the first example of an American constitution of government based upon the sovereignty of the people. It need hardly be said that the historical basis of this view may be considered as open to question, and we understand that a different position will be assumed by an eminent authority in a work soon to be published.

Professor Ordronaux passes in review the Mayflower compact, the Plymouth Declaration of 1635 ("the first exercise of the principle of Home Rule on this continent"), and the events which culminated in the Articles of Confederation, "the office of which," says Mr. Curtis, "was to demonstrate to the American people the practicability of a more perfect Union." The author then examines the principles of representative government, and investigates the claim of independent sovereignty made on behalf of the States. His conclusion will not remain in doubt when the following passage is perused: "We have now sufficiently examined this question of independent sovereignty as formerly claimed for the States. We have seen that it never had any juristic existence, and, moreover, was never claimed by them in the international sense, the only true test of political independence; and if this is once established in relation to the thirteen original States, how much less tenable must such a proposition be when sought to be applied to the thirty-one new States admitted since the foundation of the Constitution. Whence did such States, for example, as Florida, or Louisiana, or Arkansas, or any of the other States formed out of the territory of the

Nation, and whose very soil was purchased by the money of the people of the United States, obtain their original sovereignty? Strange as it may seem now, it required something more than the arguments of the Senate Chamber, or the decisions of Federal Courts, to lay this doctrine at rest. The arbitrament of civil war and the pitiless logic of the battle-field, *ultima ratio regum*, were finally invoked in its behalf ere this dogma was surrendered. It perished amid the clash of arms and the bitter throes of fratricidal strife, a stupendous monument of political folly and un-reasoning ambition."

In Chapter III, on "The State as a Qualified Sovereignty within the Union," the nature and origin of the State is discussed from the point of view of modern political philosophy, and space is given to a tabulated statement of Bluntschli's distinctions between the ancient and the modern state. The author then summarizes, in the light of judicial decisions, the nature of the States within our Union, their formation and relation to one another. Chapter IV—"Constitutional Guarantees as Elements of Civil Liberty and Federal Unity"—completes what is really a 200-page introduction to the subject of the book as indicated in title and preface. This fourth chapter comprises a review of Magna Charta, The Petition of Right, The Habeas Corpus Acts and of the leading cases in English constitutional law, classified under "The Powers of the Crown," "The Powers of Parliament," and "The Powers of the Judiciary."

"We are now prepared to enter," says Professor Ordronaux (p. 202), "upon an examination of the constitutional jurisprudence of the United States so far, and so far only, as it affects the functions of legislation." Then follows an orderly enumeration of the restraints upon the National Government and upon the States, contained in the original Constitution and in the Amendments, with an outline statement of the judicial interpretation of these restrictive provisions. In this chapter and in the ninth, which is a survey of the powers of Congress under the title, "Congressional Legislation," there is presented to the reader a summary of our constitutional law.

But in setting out to write such a summary, Professor Ordronaux has undertaken a (to use a favorite word of his) "stupendous" task. To write a sketch of our constitutional law requires the learning of a Cooley, and Professor Ordronaux would doubtless be the first to acknowledge that, as yet, the advantage, in this respect, is with the older man. Indeed, it may be said that the learning or ability of the author, as exhibited in his preliminary exposition, appears more considerable than it does when judged by the contents of the fifth chapter and of the ninth. In the first place, it is to be regretted that the author has treated of the restraints and checks upon Congress before discussing the positive power of Congress as outlined in the ninth chapter. As the chapters stand, the natural development of the subject is reversed. Then, too, the author has altogether omitted to enlarge upon that which has grown to be an integral part of the modern constitutional law—the positive power of the States to legislate. A conception of constitutional law which gives prominence only to the restraints upon the States is an imperfect conception. We expect a modern writer to recognize the fact that the Supreme Court has not rested content with enunciating the principle that the States are the residuary legatees of legislative power. The Court, in many important decisions, has established what the States *can* do as well as what they cannot. There should, in short, be a chapter on "State Legislation," and this, together with the ninth chapter, should precede the fifth.

Again, it should seem that the author is not as familiar as we have a right to expect him to be with the decisions of the Supreme Court, or, at least, that he does not know their relation to one another. His treatment of many of the most important questions may be said fairly to be inadequate. One illustration may be found in the discussion of interstate commerce, on page 462, *et seq.* We note the following passage: "The right of interstate traffic must, of necessity, include the right of bringing goods into a State. 'If this power,' says C. J. MARSHALL, in *Brown v. Maryland*, 'reaches the interior of a State, and may

then be exercised, it must be capable of authorizing the sale of these articles which it introduces. Commerce is intercourse ; one of its most ordinary ingredients is traffic. Congress has a right not only to authorize importation, but to authorize the importer to sell. It may be proper to add, that we suppose the principles laid down in this case apply equally to importations from a sister State.' So long, then, as the articles imported (from whatever source they may come, whether from abroad or from sister States) remain in the original form in which they were brought into the State, they are subject to the power exclusively vested in Congress, and are not within the jurisdiction of the police power of the State, unless placed there by Congressional action" (page 468).

But, surely, Professor Ordronaux knows that *Brown v. Maryland* involved a question only of importation from abroad, and that subsequently, in *Woodruff v. Parham* (8 Wall., 123), the Court decided in opposition to the *dictum* in *Brown v. Maryland*, that the term "imports" does *not* apply to commodities brought from sister States. In fact, this decision is referred to in another connection (page 317), so that the omission to mention it here must be regarded as an oversight. But the omission is unfortunate, as the reader is liable to be misled as to the true foundation of an important doctrine. It is unfortunate, too, that the author has failed to trace the waxing and the waning of the theory that the validity or invalidity of a tax in relation to interstate commerce depends upon the absence or presence of the element of discrimination.

Again, it is a matter of surprise that the author should, under the heading "Concurrent Powers with the States," mention the power "to establish a uniform rule of naturalization." This, of course, is not a concurrent power, but one which Congress alone can exercise. The thought which the author seems to have in his mind is that, in spite of the XIVth and XVth Amendments, the States still retain the right of prescribing conditions and annexing limitations to the exercise of the elective franchise by their citizens (page 524). But the form of statement is mislead-

ing, and the substance of it could be better treated as a positive power of the State on the lines suggested above.

A criticism of the form of a book is generally unsatisfactory, so diverse are opinions in regard to the value of "externals." But we feel that this notice would be incomplete if it failed to call attention to the curious mode adopted by the author of indicating divisions of the subject. For example, in the chapter on "Constitutional Jurisprudence," a subdivision is headed with the words "Additional Restraints upon the National Government Contained in the Amendments to the Constitution," printed in type larger than the chapter-heading. Following this come paragraphs headed in type of the same size, as follows: "Religious Freedom, Freedom of Speech, The Right to Assemble Peaceably and to Petition, Telegraphic Communications (!), Capital or Infamous Crimes, Land and Naval Forces, Twice put in Jeopardy (a subject which is treated in eighteen lines), Not Compelled to be a Witness Against Oneself, nor Deprived of Life, Liberty or Property without Due Process of Law, Private Property not to be Taken for Public Use without Just Compensation." This list of headings will be seen to be composed partly of extracts from the language of some of the Amendments, partly of catch-words referring to Amendments, and partly (as in the case of "Telegraphic Communications" and "Land and Naval Forces") of titles which, at first sight, have nothing to do with Amendments. A closer examination shows that the author is discussing the relation of the IVth Amendment to telegraphic communications, and that the exceptions in the Amendment of cases arising in the land and naval forces is made the occasion of stating (still, it will be remembered, under the head of *restraints* on Congress) that Congress is *not* restrained from punishing offences in those branches of the public service without indictment. The VIth, VIIth, VIIIth, IXth and Xth Amendments are referred to without separate headings, and then (in the same type as those above noticed) comes the title "Restraints upon the States." Under this head the subdivis-

ions are printed in italics until (under the caption "*Laws Impairing the Obligation of Contract*") we find a subdivision of a subdivision set forth in large type again as follows: "State Insolvent Laws in their Relation to the Obligation of Contracts." Then follows this extraordinary heading, "Third, As to Interstate Commerce." As there has been no "First" and no "Second," the reader is at a loss to know the significance of this caption. The author, in preparing his work, was doubtless so absorbed in his subject that he overlooked these matters of arrangement. But they are not trifles, but matters of importance, and a book which disregards them runs the risk of being called "slovenly." Thus, the seventh chapter is entitled "Judicial Legislation, including Impeachment," but it is silent on the subject of impeachment, which is, however, treated of in the eighth chapter under the special title "Impeachment."

One of the most interesting and instructive parts of the book is the sixth chapter, on "The Legislature in its Relations to Administrative Law." The historical differentiation of the legislative, executive and judicial branches of government is traced, and the necessary supremacy of the first is demonstrated—subject, of course, in the United States, to the limitations imposed by the Constitution. This is followed by an interesting exposition of the respective powers and duties of the executive and legislative departments of the several States. The chapter will be found especially useful by those for whom in particular the book is written—for those who desire (in the words of the preface) "to practice or interpret the canons of representative government in the United States." The same remark applies to the closing chapter on "The Mechanics of Legislation." It is far from our purpose to underestimate the value of the work to such men or to readers at large. It is thoughtful, well written and of unusual interest. Even if more competent critics should give real value to the comments contained in this notice by agreeing to the justice of them, the defects of the work can be remedied in that second edition which the profession will doubtless demand.